

Opportunities of Trade in Services between the EU and Ukraine: the Case of Telecommunications Services under the GATS and the Association Agreement

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ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK
CENTRE OF EUROPEAN LAW AND POLITICS

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ZERP

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**Opportunities of Trade in Services between
the EU and Ukraine:
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Agreement**

ZERP-Working Paper 1/2015

Abstract

This working paper studies the legal and regulatory conditions for trade in services between the European Union (EU) and Ukraine on the example of telecommunications services that are important carrier services for various business activities in the cross-border trade. The paper outlines the general framework for trade in services under the GATS as expressed in the commitments undertaken by Ukraine and examines the detailed provisions of the EU-Ukraine Association Agreement on trade liberalisation and regulatory approximation that is a WTO-extra agreement. It also provides an overview of the relevant Ukrainian legal and regulatory rules in order to assess the starting point for regulatory approximation. The paper intends to highlight internal contradictions of the Association Agreement representing a balancing act between the liberalisation obligations under the WTO agreements and requirements of integration in the EU internal market. The paper argues that in short to middle term the Association Agreement does not offer much of value-added in comparison to the current GATS commitments in terms of services liberalisation. The juiciest “carrot” of the Association Agreement – the internal market treatment – is difficult to reach due to unclear and complicated rules on regulatory approximation.

Key words: EU, Ukraine, trade in services, telecommunications services, liberalisation, regulatory approximation

Editorial

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List of Abbreviations

AA	Association Agreement
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CMU	Cabinet of Ministers of Ukraine
ENP	European Neighbourhood Policy
EU	European Union
GATS	General Agreement on Trade in Services
MFN	most favoured nation
NCCIR	National Commission for State Regulation of Communications and Informatisation of Ukraine
PTA	preferential trade agreement
UCRF	Ukrainian State Centre of Radio Frequencies
WTO	World Trade Organisation

1. Introduction

This paper studies the legal and regulatory conditions for trade in services between the European Union (EU) and Ukraine focusing on the example of the telecommunications sector. The EU has been the largest Ukrainian trade partner in various services sectors for many years: the EU is the second favourite destination of the Ukrainian services exports (after the CIS), and it is the largest source of services imports (currently over 50%).¹ The focus on the telecommunications sector is chosen, firstly, because telecommunications services are a valuable asset per se² and, secondly, because they are carrier services indispensable for the tradability of other services (banking, professional and business services, educational services, computer services, audio-visual services and others) and some goods (electronic commerce) and, thus, contributing directly to international trade in services and goods in general. Considering the accession of Ukraine to the WTO in May 2008 and the newly signed Association Agreement with the EU, it is deemed necessary to study how these events change the legal framework for trade and to develop a potential to enhance trade relations between the Parties by reducing regulatory barriers.

The study starts with a brief overview of selected issues of the general legal framework for trade in services set out by the GATS relevant for the topic of this investigation. Since both the EU and Ukraine are Members to the WTO,³ from the point of view of the GATS the EU-Ukraine Association Agreement is a preferential trade agreement (PTA) that has to satisfy the conditions of Article V GATS. Therefore, in the second step, this study looks more specifically at the commitments of the EU and Ukraine, undertaken multilaterally, in order to prepare a background, against which the bilateral trade relations can be ana-

1 See “Ukraine increases export of services in the EU”. Information-Analytical Bulletin of the Cabinet of Ministers of Ukraine, 14 February 2014. Available <<http://en.info-kmu.com.ua/2014-02-17-000000pm/article/6074391.html>> (accessed 31.01.2015); “EU-27 Surplus of 9 bn Euro in Trade in Goods with Ukraine in 2012.” Eurostat News release 27/2013, 22 February 2013.

2 The Ukrainian source indicates the increase of 28% in trade with telecommunications, computer and information services. See “Ukraine increases export of services in the EU”. Information-Analytical Bulletin of the Cabinet of Ministers of Ukraine, 14 February 2014; The EU is the leading exporter and importer of communications services worldwide by far. See WTO, International Trade Statistics 2013, pp. 159-161. Available <http://www.wto.org/english/res_e/statis_e/its2013_e/its2013_e.pdf> (accessed 31.01.2015).

3 The EU (European Communities and its Member States) became a founding member of the WTO in 1994. Ukraine joined the WTO in 2008, after almost 15 years of negotiations.

lysed. Next, the study turns to an examination of the parts of the Association Agreement relevant for trade in services, namely liberalisation commitments, rules on domestic regulation and questions of regulatory approximation. Against this backdrop, in the last substantive part, the study presents a snapshot of the Ukrainian legal and regulatory framework on the telecommunications sector. The main findings of the investigation with regard to the alterations of the legal conditions and perspectives for trade in services will be presented in the conclusion.

2. The WTO framework for trade in services: Ukraine's and EU's concessions under the GATS

2.1 GATS regime for trade in services: a brief and incomplete overview

The GATS constitutes the first multilateral agreement comprehensively addressing the international trade in services and covers all services sectors with exception of services supplied in exercise of governmental authority (Article I.3 (b) and (c) GATS).⁴ Due to the specifics of the subject-matter, the GATS is designed to address in the first line regulatory obstacles to trade and obstacles resulting from regulatory diversity.⁵ By contrast to goods, services are intangible and perishable, characterised by simultaneous production and consumption⁶ – and, hence, also by a certain proximity of the service provider and consumer. As a result, most of the trade in services occurs within national borders, and an “international” provision requires factor mobility that presents a challenge from the point of view of political economy.⁷ Even where a service “crosses” a border, when provided by means of (tele)communications, it is dif-

4 For the notion of “services supplied in exercise of governmental authority” see Krajewski, Markus, Public Services and Trade Liberalization: Mapping the Legal Framework, in: *Journal of International Economic Law* 6:2, 2003, pp. 341-367; Adlung, Rudolf, Public Service and the GATS, Working Paper ERSD-2005-3, 2005.

5 Matsushita, Mitsuo, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. 2nd edition, Oxford: Oxford University Press, 2006, pp. 604-605.

6 Sáez, Sebastián, The Strategic Development Role of Trade in Services, in: Sáez, Sebastián (ed.), *Trade in Services Negotiations: A Guide for Developing Countries*. World Bank, 2010, p. 1.

7 Copeland, Brian and Aaditya Mattoo, The Basic Economics of Services Trade, in: Mattoo, Aaditya, Robert Stern and Gianni Zanini (eds.), *A Handbook of International Trade in Services*, Oxford: Oxford University Press, 2008, p. 84.

difficult to apply border measures, like tariffs, to it.⁸ In these circumstances, restrictive implications emanate from divergent or even protectionist domestic rules regarding the conditions of access to the market for services providers (for instance, licensing, certificates, standards) and the modalities of services provision (for example, local content, price-based restrictions).

Due to specific characteristics of services mentioned above, trade in services is understood by the GATS as supply of services that can occur in one of the following four modes (Article I.2 GATS):

1. cross-border supply where both supplier and recipient stay in their respective States and only a service passes the frontier by means of (tele)communications (Mode 1);

2. consumption abroad where a consumer crosses the border to receive a service (Mode 2);

3. commercial presence where a supplier from one state establishes a representation, a branch or other type of commercial presence in another state for purposes of services provision (Mode 3);

4. presence of natural persons where a service supplier from one state is only temporarily established in the territory of another state by way of posting its workers or being present otherwise as a natural person (self-employed) (Mode 4).

Due to particularities of trade in services, its liberalisation takes the form of “restricting domestic regulation”.⁹ For a particular state liberalisation of trade in service means to allow participation of the private sector in services provision, to allow foreign providers to compete with domestic providers, including state-owned undertakings, on a non-discriminatory basis and to eliminate other restrictions that encourage inefficient services provision (for instance, subsidies).¹⁰

In the GATS framework these considerations are addressed through two types of obligations. First, there are general obligations that are applicable to all services sectors of any GATS Member (Part II GATS). General obligations are of great importance for the world trade in services as they provide for legal

8 Hoekman, Bernard and Carlos Primo Braga, *Protection and Trade in Service: A Survey*, The World Bank Policy Research Paper, April 1997, p. 5.

9 Matsushita, Mitsuo, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. 2nd edition, Oxford: Oxford University Press, 2006, p. 604.

10 Sáez, Sebastián, *The Strategic Development Role of Trade in Services*, in: Sáez, Sebastián (ed.), *Trade in Services Negotiations: A Guide for Developing Countries*. World Bank, 2010, p. 7.

certainty for economic actors about the minimum rules in a foreign country. The most important of them are:

- most favoured nation (MFN) treatment (Article II GATS),
- transparency (Article III GATS),
- domestic regulation (Article VI GATS),
- competition-related requirement (Articles VIII and IX GATS),
- progressive liberalisation via continuous negotiations.

MFN treatment basically prohibits a GATS Member to discriminate between like services and like service providers from different countries because it mandates to treat all foreign service providers in the same way as it treats those from its most favoured trade partner. The MFN treatment shall be granted automatically and unconditionally¹¹, and exemptions to it have a limited character, based on the so called negative list approach, and could be taken only during the Uruguay negotiations round. Currently, deviations from the MFN treatment are possible only on the basis of the waiver provisions (Article IX.3 WTO Agreement).¹²

The transparency provision requires that relevant regulations of a GATS Member shall be clear and readily accessible to foreign service providers through publications, inquiry points and periodical notification of the Council on Trade in Services of all relevant new rules.

Requirements to domestic regulation set out in the GATS are of procedural and substantive nature. The procedural obligation requests GATS Members to administer measures affecting trade in services in a reasonable, objective and impartial manner and to establish adjudicating bodies for disputes concerning trade in services that function in a timely, impartial and objective manner. On the substantive level, GATS Members are to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

Of particular importance for many services sectors are competition-related requirements aimed at keeping the behaviour of monopolistic and exclusive services providers in check in order not to compromise liberalisation commitments made by a GATS Member. The same applies to restrictive business

11 For interpretation of the term see Matsushita, Mitsuo, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. 2nd edition, Oxford: Oxford University Press, 2006, pp. 621-622.

12 Matsushita, Mitsuo, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. 2nd edition, Oxford: Oxford University Press, 2006, p. 623.

practices of market operators.

The second type of GATS obligations – sector-specific obligations – are reciprocal commitments on liberalisation of specific services sectors. Sector-specific obligations are applicable only to the services, explicitly listed in the schedule of commitments of each Member (so called positive list approach), and only to the extent indicated in the schedule of commitments (Part III GATS). The most important specific obligations are market access (Article XVI GATS) and national treatment (Article XVII GATS).

The content of market access commitments is not defined in general, but is determined in country schedules for each and every service or services sector. The GATS only requires its Members to ensure that market access actually granted to foreign services suppliers corresponds to the respective legal obligations of such Member. Therefore, Article XVI GATS does not set a non-discrimination standard, but requires that all limitations to market access, both discriminatory and not, are stated in schedules of communications.¹³

By contrast, the national treatment obligation, if accepted by a GATS Member, does constitute a non-discrimination requirement: it does not allow discriminating between foreign and domestic like services and service suppliers. At the same time, the standard of treatment required is not equality, but no less favourable treatment what, even though unlikely, may lead to positive discrimination of foreigners.

Even though it is almost impossible to address liberalisation and limitations remained in every single services sector in detail due to the fact that domestic rules are very greatly depending on the type of services,¹⁴ a couple of general words can be said about the liberalisation profile of the EU and Ukraine as expressed in their schedules of commitments.

An assessment of the EU's commitments in liberalising trade in services is a difficult project. The EU's specific commitments are complicated as they consist of schedules of specific commitments of all its Member States.¹⁵ This makes a concise and relatively comprehensive overview impossible. However,

13 Krajewski, Markus, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, The Hague, Kluwer Law International, 2003, p. 82.

14 Deardorff, Alan and Robert Stern, *Empirical Analysis of Barriers to International Services Transactions and the Consequences of Liberalization*, in: Mattoo, Aaditya, Robert Stern and Gianni Zanini eds.), *A Handbook of International Trade in Services*, Oxford: Oxford University Press, 2008, p. 178.

15 See, for instance, a Draft consolidated GATS schedule of 2006 submitted for certification to the Council for Trade in Services, Communication from the European Communities and its Member States, S/C/W273 of 09.10.2006.

some general observations can be made in order to outline the main features and the spirit of the undergone commitments. Openness to global trade is a critical requirement for growth and competitiveness of the EU's economy and allows exploiting benefits of the internal market in full.¹⁶ Therefore, opening the markets, especially by reducing non-tariff barriers, in "cornerstone" sectors of the European economy, like services, is high on the EU's agenda.¹⁷

The EU's commitments cover 115 services subsectors of 155 that were on the negotiations table during the Uruguay round.¹⁸ Eschenbach and Hoekman found the EU-15 level of specific commitments on market access and national treatment to be higher than that of other developed WTO Members.¹⁹ A study by Langhammer confirmed this finding for the EU's offer filed in the Doha negotiation round: the offer significantly increases the overall commitment level, in particular in Modes 2 and 3.²⁰ Few limitations on services provision in Modes 2 and 3 remain in place, maintained by a minority of EU Member States. The only limitations in place for the whole EU are the following: With regard to market access, in public utilities sectors monopoly and/or exclusive rights can be maintained. With regard to national treatment, freedom of establishment applicable to subsidiaries from other EU Member States does not extend to subsidiaries from third countries. Mode 4 is unbound both with regard to market access and national treatment, and very few horizontal concessions (locking in the status quo) are made to allow intra-corporate transfer, presence of business visitors and contractual service suppliers. The restrictions maintained by individual EU Member States vary so greatly depending on a service and mode of provision that any attempt to classify them is likely to be incomplete.²¹

16 See one of the most recent statements in Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy, COM(2006) 567 final, p. 4.

17 *Ibid.*, pp. 5-6.

18 Hoekman, Bernard, Aaditya Mattoo and André Sapir, The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation? in: Oxford Review of Economic Policy 23:3, 2007, p. 374.

19 Eschenbach, Felix and Bernard Hoekman, Services Policy Reform and Economic Growth in Transition Economies, 1990–2004, in: Review of World Economics 142:4, 2006, pp. 746-764.

20 Langhammer, Rolf, The EU offer of service trade liberalization in the Doha Round: evidence of a not-yet-perfect customs union, in: Journal of common market studies 43:2, 2005, pp. 311-325.

21 However, see a short classification in Langhammer, Rolf, The EU offer of service trade liberalization in the Doha Round: evidence of a not-yet-perfect customs union,

Ukraine's specific commitments in services²² can be considered quite far-reaching as they cover subsectors in all eleven services sectors under negotiations in the Uruguay round, with only few limitations in market access and national treatment. The most notable (horizontal) limitation preserved concerns Mode 4: Ukraine remains unbound (undertook no commitments) with regard to market access and national treatment in all services sectors. It declared, however, its horizontal restrictions for Mode 4 that are applicable to all schedules services sectors. In this way, it has locked internationally its regulatory regime for economic migrants with the effect that it will not be able to change it easily and this level of commitments will be a departure point for further liberalisation negotiations. For foreign individuals who are executives, managers and specialists transferred within a corporation²³ a work permit is issued for a period of 3 years and may be extended for further 2 years. Other foreign individuals, namely services sellers and persons responsible for the establishment of commercial presence in Ukraine, can enter and stay in Ukraine up to 180 days per one calendar year without a work permit. Ukraine did not reserve a transition period for any of the services sectors, although usually countries with economy in transition and developing countries negotiate an adjustment period for themselves.

2.2 *Commitments in telecommunications services sector*

In the telecommunications sector, both the EU and Ukraine undertook commitments in all the services on the Services Sectoral Classification List, aka W120 list²⁴, used as a common basis to describe services in negotiations. Differently from many developing countries and countries with transition economy, Ukraine committed itself to liberalise both the so called basic and value-added telecommunications.

According to paragraph 1 of the Decision on Negotiations on Basic Telecommunications "basic telecommunications" are defined as "telecommunications transport of networks and services".²⁵ Under the W120 list, basic telecommunications include the sub-sectors from (a) to (g): voice telephone services, packet-switched data transmission services, circuit-switched data trans-

in: Journal of common market studies 43:2, 2005, pp. 13-15.

22 Ukraine's Schedule of Specific Commitments, GATS/SC/144 of 10 March 2008.

23 See Ukrainian schedule of specific commitments for definition of the terms "executive", "manager" and other.

24 MNG/GNS/W/120 of 10 July 1991.

25 Decision on Negotiations on Basic Telecommunications Services of 15 April 1994.

mission services, telex services, telegraph services, facsimile services, private leased circuit services. Due to the fact that the W120 list is an open one, under the category (o) (“other”) Ukraine listed additional services as basic telecommunications: mobile voice and data services, paging services, teleconferencing services, integrated telecommunication services, excluding broadcasting.

The services from (h) till (n) of the W120 list are considered value-added telecommunications meaning that they enhance the mere transportation of the electro-magnetic signal by processing, storing, forwarding or other operations with the signal without, however, changing the content of the transmitted message. However, there is no legal or other definition of value-added telecommunications in the GATS documents or in the Ukrainian schedule. In the Ukrainian schedule value-added services include electronic mail, voice mail, on-line information and data base retrieval, electronic data interchange, value-added facsimile services, including store and forward, store and retrieve, code and protocol conversion and on-line information services and/or data processing (including transaction processing).

The EU’s schedule does not list separate services and/or subsectors falling under basic and value-added telecommunications. In fact, it uses a different definition of telecommunications services altogether that is in line with its internal term “electronic communications”. Accordingly, telecommunications are all services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting. Telecommunications do not cover the economic activity of content provision which require telecommunications services for their transport. The relevant services of the W120 list are covered only in so far as they fall under this description. Herewith, the coverage of EU’s specific commitments goes beyond the respective parts of the W120 list, but is not clearly identifiable.

In all the named types of telecommunications services, Ukraine made no limitations in the modes of services provision 1 to 3 (cross-border supply, consumption abroad and foreign commercial presence) either for market access or for national treatment. Only presence of natural persons (mode 4) remains unbound in both regards:²⁶ no sector specific liberalisation is intended in this regard, yet horizontal commitments and limitations are applicable. From the perspective of the telecommunications industry, the limitations of mode 4 cannot be considered significant because the nature of telecommunications service is such that it does not require a personal (human) presence, but rather a commercial presence.

Therefore, a prohibition for foreign and stateless natural persons to acquire

26 This is the case for all services sectors.

into property agricultural lands, to privatise or to acquire free of charge land plots belonging to the State is of no relevance for the telecommunications sector. On the other hand, it is important that there are no restrictions on national treatment for foreign legal persons acquiring non-agricultural lands into property – what is more relevant for telecommunications business. Also, potentially relevant is the rule that access to subsidies and other forms of State support is limited to Ukrainian citizens and legal persons. National treatment in this regard does not apply to foreigners.

Commitments undertaken by the EU are very similar. Mode 4 remains unbound, while no limitations are maintained by the absolute majority of EU Member States in Modes 1-3. The lonely exceptions are Cyprus and Malta that have chosen to stay unbound in Mode 1 with regard to market access and national treatment; Finland that imposes conditions of residence on founders and board members; and France, Poland and Slovenia that maintain limitations on foreign participation in companies.

2.3 Additional commitments on regulatory principles

The EU and Ukraine undertook a set of additional commitments known as the Reference Paper on Regulatory Principles (Reference Paper). For Ukraine, these additional commitments apply to the basic telecommunications services listed in its schedule. The EU made a separate list of services to which the Reference Paper applies. This list largely corresponds to the Ukrainian list of basic telecommunications with the only difference that the category (o) “other” specifies solely mobile and personal communications services and systems.

As the title suggests, under the Reference Paper Parties have committed themselves to design their domestic regulatory frameworks for basic telecommunications according to certain principles. The Reference Paper addresses the most critical issues of the telecommunications services sector and market in order to ensure effective opening up of national markets to foreign providers. For this, the Reference Paper requires the signatories to introduce several competition law elements, guarantees of interconnection, procedural requirements of transparency and to provide for independence of the sectoral regulatory body. Although Parties may modify additional commitments of the Reference Paper, both the EU and Ukraine signed this document in identical wording.

According to Section 1 of the Reference Paper, a Party is to adopt competitive safeguards in order to prevent anti-competitive practices by a major supplier. This is to guarantee that the incumbent does not abuse its position and market strength to prevent or deter new market entries and to disturb the activities of competitors. Among the examples of anti-competitive practices the Reference

Paper names anti-competitive cross-subsidisation, using information from competitors with anti-competitive results and not providing competitors with technical information about essential facilities and with commercial information necessary for them to provide services. A position of a major supplier can be held individually or collectively by suppliers who can materially affect participation on the relevant market (namely, price and supply) due to control over essential facilities or due to use of its position in the market. Essential facilities are defined by the Reference Paper as facilities of a public telecommunications transport network or service that are exclusively or predominantly provided by a single or limited number of suppliers and that cannot feasibly be economically or technically substituted in order to provide a service.

Interconnection with domestic telecommunications providers is of central importance for foreign market participants willing to reach customers directly and compete on the domestic market. Especially in the market for fixed telecommunications, construction of wired or cable telecommunications networks may be economically not feasible (duplication) or even physically not possible. That is why a large part of the Reference Paper addresses establishment of interconnection defined as linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier (Section 2.1).

The focus of the provisions of Section 2 of the Reference Paper is on ensuring interconnection with a major supplier. This is a logical approach as the incumbent, who would fall under the definition of a major supplier, usually owns the biggest or maybe even the only public telecommunications network, and inability to interconnect with its network would make it impossible to provide services and to compete in the host market. Therefore, interconnection with a major supplier needs to be ensured at any technically feasible point of the network. Additionally, such interconnection is subject to several conditions that are aimed at preventing discrimination between services of a major supplier and other domestic services, on the one hand, and the services of a foreign provider, on the other, and that anticipate other deterring tactics by a major provider (Section 2.2). Procedures for interconnection negotiations with a major supplier shall be made publicly available as shall be its interconnection agreements or a reference interconnection offer (Section 2.3 and 2.4). Disputes on interconnection matters shall be dealt with in a timely manner by an independent body (Section 2.5).

As a part of a (public) utilities sector, telecommunications are considered strategically important for a state and nation (territorial and national cohesion), for development of the economy (carrier of other services and a main infrastructure of the future Information Society) and for the society (freedom of in-

formation, general necessity to communicate). The tremendous importance of this sector together with its network character used to justify the provision of telecommunications by only one undertaking, which was usually state-owned or at least state-controlled, as well as the imposition of certain public policy obligations on the telecommunications provider. Public policy concerns may constitute serious barriers to trade by reserving some types of activity exclusively for domestic suppliers or by introducing strict conditions and/or restrictions of provision that undermine liberalisation.

One of the most important public policy measures for the telecommunications sector is addressed by Section 3 of the Reference Paper – universal service. Universal service is a concept of provision of particular telecommunications services in such a way that they are available and affordable to the whole population of a State. The concrete legal and regulatory expression of this idea differs from state to state. A Party reserves its right to define universal service obligation. In order not to undermine the general liberalisation commitment, the universal service obligation needs to be administered in a transparent, non-discriminatory and competitively neutral manner and not to be more burdensome than necessary.

Each Party is free to introduce licensing as long as the principle of transparency is complied with and licensing criteria, terms and conditions of individual licences and decision-making timeframe are publicly available (Section 4).

Radio spectrum, numbers and rights of way constitute scarce resources for telecommunications activities, and mechanisms of their allocation and their use may be employed to disturb competition on the market and thus to undermine the free trade in telecommunications services. According to Section 6 of the Reference Paper, a Party undertakes to carry out its activities in these areas in an objective, timely, transparent and non-discriminatory manner.

3. Trade in telecommunications services under the EU-Ukraine Association Agreement

3.1 *General issues of trade in services under the Association Agreement*

The Association Agreement between the EU and Ukraine, even though developed within the framework of the European Neighbourhood Policy, represents a classical mixed agreement of the type concluded between the EU and its Member States, on the one side, and a third country, on the other. According to Article 217 TFEU, the association agreement is the most advanced type of an

agreement the EU may conclude with third countries. This type of agreement has been used by the EU in two situations:

- 1) in preparation of certain states for the accession to the EU (Turkey, Croatia), and
- 2) as an alternative to the EU membership (Norway, Lichtenstein).

The EU sees association and accession as two different processes that may be, but not necessarily are connected. Association may be followed by accession, but the latter is not automatic and depends on a number of factors, not least on the political will of the parties and on the absorption capacity of the EU. The EU's Association Agreement with Ukraine is of the second type as its objectives suggest (Article 1 AA): it foresees gradual rapprochement between the Parties, increasing Ukrainian association with EU's policies and agencies, enhancing dialogue and cooperation in a number of areas, including economy and trade, and eventually leading to Ukrainian integration into the EU internal market – with no accession option just now.

At the moment the Association Agreement is not in force, but its parts on political cooperation (Title II) and on economic cooperation were signed on 21 March and on 26 June 2014 respectively. On the day of signature, many separate provisions that have considerable implications for the trade environment entered into force according to the text of the Agreement.

During the negotiations of the Association Agreement and even before that (during the preparation of the ENP), there was much speculation about what the EU could offer its partner countries in terms of trade and economic concessions if accession to the EU was off the negotiations table. European foreign trade is largely liberalised due to extensive concessions in the WTO. Most neighbouring countries benefitted from the EU's Generalised System of Preferences while the EU sponsored their accession to the WTO,²⁷ so that they can enjoy advantages of free trade. Remaining obstacles to trade, most notably in the areas of agriculture and mobility of natural persons that are of the prime interest for the neighbours, are not likely to be removed in the near future. In this situation, a stake in the EU internal market seems to be the only viable option.²⁸ Therefore, a specific feature of the Association Agreement between the EU and Ukraine is the creation of a free trade area that is “deep and comprehensive” with the finality of “internal market treatment”.

What exactly does it mean for trade in services in general and for telecommunications services in particular?

27 Klaus Günter Deutsch, Looking for Partners. The EU's free trade agreements in perspective. Deutsche Bank Research, 27 July 2012, p. 8.

28 *Ibid.*

Due to the fact that both Parties are Members of the WTO/GATS, their commitments under the above mentioned agreements build a departure point for the Association Agreement. From the GATS perspective, the Association Agreement to an extent (in the part on trade in services) is a preferential trade agreement (PTA) and therefore needs to be notified to the WTO Council for Trade in Services (Article V.7 (a) GATS). It also needs to satisfy substantive requirements of Article V GATS. First, it shall have substantial sector coverage in terms of number of sectors covered, volume of trade affected and modes of supply. To meet this condition no mode of supply shall be *a priori* excluded. However, it is not clear how many sectors should be included or what threshold for volume of trade could be used so that the exact meaning of these requirements remains unclear.²⁹ Second, in the sense of the GATS, a PTA provides for the absence or elimination of substantially all discrimination in the services sectors covered by such PTA, through elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures. Third, the agreement shall be designed to further facilitate trade between its Parties; the level of barriers to trade in services shall not rise as a result of such agreement. As will be shown in the subsequent analysis, the EU-Ukraine Association Agreement does fulfil all three requirements.

Under the Association Agreement the Parties are to progressively liberalise both the establishment and trade in services and to cooperate on electronic commerce (Article 85 (1) AA). Progressive liberalisation shall be ensured by the inbuilt review mechanism: the Parties undertake a commitment to review the established legal framework regularly and to further address remaining obstacles through negotiations (Arts. 89 and 96 AA). For cross-border supply of services this review shall take into account transposition, implementation and enforcement of the EU *acquis* (Article 96 AA). Unfortunately, there are no indications how often such reviews are to take place.

In addressing trade in services, the Association Agreement tries to marry the EU and the WTO approaches. It departs from the vision of trade in services as supply of services in four Modes. Instead, it differentiates between establishment of legal and natural persons, trade in services that seems to include supply of services cross-border and via temporary presence of natural persons, and electronic commerce that is also considered cross-border supply of services (Article 139 AA). Herewith, no GATS Mode of services supply is excluded, even though Mode 2 is not spelled out in the text of the Association Agreement and appears in schedules.

29 Matsushita, Mitsuo, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. 2nd edition, Oxford: Oxford University Press, 2006, p. 579.

Enhancement of trade liberalisation is immediately obvious as it covers all services sectors so that the commitments of national treatment and market access are not limited to only the listed sectors. A minimum of sectors is excluded from the scope of the agreement (Arts. 87 and 92 AA). Mining, manufacturing and processing of nuclear materials and production of or trade in arms, munitions and war material are exempted from liberalisation in Mode 3 (establishment). Audio-visual services and national maritime cabotage are exempted both from liberalisation of establishment and liberalisation of what is termed trade in services. Domestic and international air transport services and some services directly related to the exercise of traffic rights (for instance, airport operation, computer reservation systems etc.) are not subject to the Association Agreement and will be covered by a separate agreement marking Ukraine's accession to the Common Aviation Area.³⁰

Regarding establishment of legal and natural persons, the Parties agree to grant national or MFN treatment – whichever is the better – for establishment and operation of subsidiaries, branches and representations on the basis of reciprocity (Article 88 AA). By contrast to the GATS, establishment goes far beyond services supply and covers “all economic activities” with the exception of the indicated above. In their respective schedules of commitments on establishment, the EU and its Member States (Annex XVI-A AA) and Ukraine (Annex XVI-C AA) foresee a number of restrictions. Horizontal restrictions, applicable to all sectors, refer to public utilities that may remain public monopolies or be granted exclusive rights; to the necessity to be incorporated in the EU in order to be able to provide certain services; to limitations on purchase of real estate in individual Member States and to national requirements to shareholding and/or board appointment. Sector-specific limitations are very diverse, but not extensive, and are preserved in such sensitive sectors as agriculture and fisheries, financial, health and educational services as well as energy and water supply. However, for establishments in telecommunications services sector no limitations are scheduled.

With respect to market access through the cross-border supply of services (Mode 1) and national treatment of like services, provided in such way, and service suppliers, the Parties attach special schedules of commitments following the scheduling practice under the GATS (Arts. 93-94 and Annexes XVI-B and XVI-E AA).

Both Annex XVI-B and Annex XVI-E, containing sector-specific commitments of the EU and Ukraine respectively, use the term “telecommunications

30 The respective agreement was initialed in November 2013 in Vilnius, but is not yet in force. See <http://europa.eu/rapid/press-release_IP-13-1181_en.htm> (accessed 31.01.2015).

services”. While Ukraine closely follows its GATS schedule both as regards the terminology and the extent of commitments, the EU follows its scheduling practice in the recent free trade agreements with CARIFORUM countries of 2008³¹ and with the Republic of Korea of 2011³², which corresponds to the Draft consolidated GATS schedule of 2006 submitted for certification to the Council for Trade in Services. The EU makes no direct references to the Central Product Classification. First, telecommunications services are defined in negative: they do not cover the economic activity consisting of the provision of content which requires telecommunications services for its transport. Second, it is indicated that telecommunications services comprise satellite broadcasting transmission services³³ and all services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting. Following its internal approach, the EU does not make distinction between basic and value-added telecommunications, in compliance with the EU internal legal framework³⁴, so that the commitments cover all services consisting of the transmission and reception of signals by any electromagnetic means. Neither Party imposes any restrictions on services supply in Modes 1 and 2.

Mode 4 remains largely unliberalised. The positive achievement of the Association Agreement is the locking-in of the policies and rules in place. Current requirements to entry and stay for key personnel, graduate trainees, business service sellers, contractual services suppliers and independent professionals are listed in more detail than in the respective GATS schedules and (hopefully) will provide a basis for further liberalisation. The Parties cannot introduce unilaterally more restrictive conditions than set out in the Association Agreement.

All in all, the level of trade liberalisation and the Parties’ concessions in trade in telecommunications services do not go far beyond the commitments under the GATS. The value-added of this agreement seems to lie elsewhere,

31 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289 of 30.10.2008.

32 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 of 14.05.2011.

33 Those are telecommunications services consisting of the transmission and reception of radio and television broadcast by satellite, namely the uninterrupted chain of transmission via satellite required for the distribution of TV and radio programme signals to the general public.

34 Compare Article 2 (c) of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108 of 24.04.2002, pp. 33-50.

namely in its detailed provisions on domestic regulation. For individual services sectors (computer services, postal and courier services, electronic communications, financial services, transport services, electronic commerce) the Association Agreement foresees principles for the domestic regulatory framework of the Parties, at times (for the last four sectors named) quite extensive and detailed. This research discusses exclusively the principles for domestic regulation for the telecommunications services sector that has been chosen as an example (Sub-Section 5 Section 5 Chapter 6 AA, further – Sub-Section 5).

3.2 *Terminological note on rules for domestic regulation*

The initial difficulty of this Sub-Section is that it does not use the term “telecommunications” as the lists of commitments do. Instead, the term “electronic communications” is used, which in its turn is absent from the lists. The definitions of the two terms differ. According to Article 115 (2) AA, electronic communication services are services consisting of the transmission and reception of electro-magnetic signals and normally provided for remuneration, except for broadcasting, which does not cover the economic activity consisting in the provision of content that requires telecommunications for its transport. This definition is misleading because it creates an impression that electronic communications are different from, even somewhat unrelated to telecommunications services.

This definition is obviously borrowed from the EU’s internal legal framework on electronic communications. However, for reasons one can only guess, most likely for the sake of simplification, it has been altered and has lost its original clarity and precision. In its original form, the notion of electronic communications services covers all services consisting wholly or mainly in the conveyance of signals, but excluding services that provide content or exercise editorial control over it. By this definition, telecommunications services are part of electronic communications services.³⁵

The terminological mix-up has different practical implications for the Parties. For the EU, it makes no difference. Firstly, it understands telecommunications broadly in its own commitments’ list. Secondly, it considers telecommunications a part of electronic communications. Thirdly, as will be shown further below, all the requirements of Sub-Section 5 are based on the EU’s internal legal and regulatory framework for electronic communications.

For Ukraine, the unclear terminology may result in unforeseen commitments. Sub-Section 5 applies not only to services specified in the lists of com-

35 See the full definition in Article 2 (c) Framework Directive.

mitments, but to all services liberalized under Sections 2, 3 and 4 Chapter 6 (Article 115 (1) AA), which means to all services sectors except for the ones explicitly excluded. A likely interpretation of electronic communications is that it includes telecommunications, but is broader than this and covers also other forms of communication. In such a case, the requirements of Sub-Section 5 apply not only to domestic regulation of all telecommunications services listed, but also to other – unidentified in the list of commitments – services. For instance, electronic communications services may include provision of private networks, Internet telecommunications services (access to Internet and traffic over Internet, provision of distributed computer networks similar to Internet), Internet backbone services, Internet access services (wired and wireless), satellite communications services and other services.

All other definitions of Article 115 AA – public communication network, electronic communication network, regulatory authority, service supplier, interconnection, universal service, access, end-user, local loop – are borrowed, mostly in an unchanged form, from Article 2 Framework Directive and reflect the current regulatory state of the art in the EU. These terms represent a potential difficulty for Ukraine in so far as they all are based on the notion of electronic communications.

Interestingly, the Association Agreements with Moldova and Georgia are much more clear terminologically: in both of them the term “electronic communications services” is used consistently and defined in the same way as in the EU Framework Directive (Article 231 EU-Moldova AA and Article 104 EU-Georgia AA).

3.3 Principles for domestic regulatory framework for telecommunications services: An overview of individual principles

Even though Sub-Section 5 claims to contain principles for domestic regulation, its provisions are formulated in the form of requirements and are very detailed. Without a single exception, all the requirements come straight from the EU’s legal and regulatory framework for electronic communications, and even their wording often remains the same as in the EU Directives. In this context, even though every single Article starts with the words “the Parties shall ensure”, what actually meant is that Ukraine shall bring its legislation in compliance (unless, of course, there are requirements of non-discrimination and impartiality). All EU Member States have already implemented the respective provisions of the EU regulatory package of 2002 in their national law. This turns the Association Agreement into an asymmetric one with the EU exporting its regulatory model and Ukraine adjusting to it.

This is in stark contrast with the latest FTA agreements of the EU (for instance, with Korea and CARIFORUM countries) that use a more reserved language reminiscent of the GATS and formulate regulatory principles in a more balanced manner.³⁶ However, the asymmetry makes sense in case of Ukraine: regulatory adjustments are necessary to reduce non-tariff barriers to services trade, and Ukraine needs to make them if it wishes to increase its share of services exports to the EU – the biggest market and trade partner.³⁷ Besides, for alignment of Ukrainian rules to the European ones speaks the underlying motivation for the Association Agreement: as a long-term objective Ukraine wishes to join the EU, and adoption of the *acquis communautaire* is one of the central preconditions for it.

Similarly to Article 3 Framework Directive, Article 116 (1) AA requires creation of an independent regulator for electronic communications that is legally distinct and functionally independent from any service provider. If state ownership of or control over a supplier of public communications networks or services is retained, effective structural separation of the regulatory function from activities associated with ownership or control shall be ensured. The regulatory body shall have sufficient powers to carry out the following tasks:

- to carry out an analysis of relevant product and service markets under conditions of Article 118 AA (Article 116 (4) AA);
- to identify and designate service suppliers with significant market power and to impose on them, maintain, amend or withdraw specific regulatory obligations as required by Article 118 AA (Article 116 (5) AA);
- to resolve disputes between suppliers of electronic communications regarding their rights and obligations resulting from the Association Agreement by issuing a binding decision (Article 123 (1) AA);
- to coordinate its efforts with other regulatory bodies in case where a dispute between suppliers concerns cross-border services provision (Article 123 (3) AA).

The Association Agreement aims to facilitate the taking-up of activity in the electronic communications sector and the subsequent operations. Therefore, some of its provisions have a deregulatory character aiming at minimising “red tape” limitations. In this context, Article 117 (1) AA requires that an authorisation for provision of electronic communications shall be in the form of mere notification and/or registration “as much as possible”. Licences can be required

36 Compare to Arts. 94-102 EU-CARIFORUM Agreement and Arts. 7.27-7.36 EU-Korea Agreement.

37 See structure and dynamics of Ukrainian trade in services at Ukrainian State Statistics Service: <<http://ukrstat.org/en>>.

for attribution of numbers and frequencies (Article 117 (2) AA),³⁸ subject to a number of conditions ensuring a transparent, impartial and non-burdensome process of their issuance (Article 117 (3) AA).

Interconnection of electronic communications networks and access to network facilities and services of another supplier have been traditionally heavily regulated issues, especially where there is a state-controlled or state-owned incumbent operator. Article 118 (1) AA intends to reduce regulation in this field by suggesting that interconnection “should in principle be agreed” in commercial negotiation between the legal persons concerned and, therefore, be a subject to contracts law / civil law. Regulatory intervention is warranted only where a relevant market is considered not effectively competitive. In such a case, the regulatory body needs to designate providers with significant market power and may impose certain obligations on it in relation to interconnection and/or access (Article 118 (3) AA).

The obligations to be imposed are designed to curb market power of the incumbent in order to create a level-playing field for competitors, especially for new entrants. The obligations are based on the EU experience in creation of the internal market for electronic communications and correspond fully to the obligations list the EC Access Directive³⁹. The regulatory authority can impose one or more of the following obligations:

- obligation of non-discrimination (compare to Article 10 Access Directive);
- for a vertically integrated undertaking – obligation to make transparent its wholesale prices and its internal transfer prices (compare to Article 11 (1) Access Directive);
- obligation to meet reasonable requests for access to, and use of, specific network elements and associated facilities including unbundled access to the local loop (compare to Article 12 (1) (a) Access Directive);
- obligation to provide specified services on a wholesale basis for resale by third parties; to grant open access to key technologies that are indispensable for the interoperability of services or virtual network services; to provide co-location or other forms of facility sharing; to provide specified services necessary to ensure interoperability of end-to-end services

38 Unfortunately, these two cases are not presented as exceptions so that licenses can be also used in other cases, even as authorization, if the licensing procedure complies with the requirements of Article 117 (3) AA.

39 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108 of 24.04.2002, pp. 7-20.

to users; to provide access to operational support systems in order to ensure fair competition in services provision; to interconnect networks or network facilities (compare to Article 12 (1) (d)-(i) Access Directive);

- obligations relating to cost recovery and price controls, including obligations for cost orientations of prices and obligations concerning cost accounting systems (compare to Article 13 (1) Access Directive);
- obligation to publish the specific obligations imposed on a service supplier by the regulatory authority identifying the specific product/service and geographical market;
- obligations of transparency (compare to Article 9 (2) Access Directive).

Frequent mentioning of competition and competitors, use of the criterion of “effective competition” (Arts. 118 (3) and 116 AA), “fair competition” (Article 118 (3) (d) AA) and “sustainable competition” (Article 118 (3) (c) AA) for the analysis of a relevant market, the evident attempts to keep in check activities of suppliers with significant market power – this all allows to conclude that the electronic communications market of both Parties shall be subject to regulation by general competition law. (According to the provision of Chapter 10 Title IV AA, Ukrainian competition law will have to be significantly amended and will become similar to the EU competition law.) In this context, national regulatory authorities will identify individual markets that lack effective competition and shall therefore be subject to regulatory intervention. Indicative lists of such relevant product and services markets are contained in Annexes XIX and XX to Chapter 6 for the EU and Ukraine, respectively. For the EU, the indicative list naturally corresponds to the Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services⁴⁰ and encompasses seven markets. The indicative list for Ukraine is 17 markets long and is a copy of the previous version of the Commission Recommendation on relevant markets subject to ex ante regulation⁴¹, which was in force immediately after the liberalisation of the market for electronic communications in the EU. Both indicative lists are subject to “regular revision” by each Party individually, although in the case of Ukraine such revision is linked

40 OJ L 344 of 28.12.2007, pp. 33-50.

41 Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114 of 08.05.2003, pp. 45-49.

to the approximation of its laws to the EU *acquis* (Fn. 1 to Article 116 (4) AA). The linkage is not closer explained so that it is not clear whether Ukraine can review the list only in case of progress in the approximation process.

With regards to the analysis of product and services markets, many questions arise, both for Ukraine and the EU. For instance, it is not clear what is meant by “effective competition” that is the standard of assessment of competition on the relevant market (Arts. 118 (3) and 116 AA) and how it relates to “fair competition” (Article 118 (3) (d) AA) and “sustainable competition” (Article 118 (3) (c) AA), that are criteria used for imposition of individual obligations on undertakings with significant market power. Of course, this is less of a difficulty for the EU with its well developed competition law and practice and extensive case law of the Court of Justice of the EU (CJEU). The same cannot be said about Ukraine; besides, at least according to the current obligations, Ukraine is not supposed to implement the complete competition law *acquis* and, in particular, it is not supposed to follow the interpretations of the CJEU (see Chapter 10 Title IV, especially Arts. 253-256 AA).

Article 119 (1) AA repeats the additional commitments of Section 6 GATS Reference Paper undertaken by the Parties for administration of scarce resources (principles of objectivity, proportionality, transparency, non-discrimination and timeliness). Subsequently, more attention is paid to the effective management of radio frequencies that are a critical asset for the development of mobile electronic communications technologies, but are also necessary for other uses (broadcasting, security). Assignment of radio frequencies needs to be done in such a way that optimises their use and facilitates the development of competition (Article 119 (2) AA).

Article 120 AA that deals with universal service provisions by the Parties is almost completely identical with the respective provisions in the EU-CARIFORUM Agreement.⁴² Paragraphs 1 and 2 repeat Section 3 GATS Reference Paper. Paragraphs 3 and 4 contain a summary of the EU universal service instrument.⁴³ While the definition of the scope is at a complete discretion of the Parties, correspondence of all other elements and their compliance with market liberalisation is ensured. Any service supplier can be designated for universal service provision through an efficient, transparent, objective and

42 Only a few words are omitted in the Ukrainian Association Agreement by comparison to Article 100 EU-CARIFORUM Agreement. This has no bearing on the overall meaning.

43 Compare to the main elements of the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108 of 24.04.2002. pp. 51-77.

non-discriminatory mechanism. There is guidance how to determine the net cost of universal service provision and whether it is an unfair burden for the designated supplier. There is also an indication of two financing mechanisms for universal service provision. There is a requirement that directories of all subscribers shall be available to users, but from the wording of Article 120 (4) AA it is not completely clear whether it constitutes a part of universal service.

This form of a provision on universal service is not very common for EU's free trade agreements. Most of them replicate Section 3 GATS Reference Paper.⁴⁴ Only via the Ukrainian Association Agreement and the CARIFORUM Agreement the EU tries to export its concept of universal service provision.

Considering the detailed character of the above provisions and the fact that they effectively represent requirements to the Ukrainian legal and regulatory framework, the "principles for the regulatory framework" as they are called in Article 115 (1) AA in fact aim at regulatory approximation. As mentioned above, all the provisions of Sub-Section 5 are extracted from the EU's regulatory framework. In order to comply with these provisions, Ukraine will have to carry out profound reforms (see Section 4 of this paper) that consist in implementing EU's rules – as reproduced in the Association Agreement – in the Ukrainian legislation. This regulatory approximation in disguise is supported by the rules on real regulatory approximation to be discussed below in Section 3.4 of this paper: as will be shown, the parts of the *acquis* to be implemented are directly relevant to ensure compliance with the domestic regulation requirements.

3.4 *Regulatory approximation in the field of electronic communications*

Under the Association Agreement, Ukraine is obligated to align its legislation to that of the EU *acquis* with regard to four services sectors: financial services, postal and courier services, international maritime transport and electronic communications (for the latter sectors see Article 124 AA). By contrast to other provisions, the obligation of regulatory approximation enters into force on the date of signing of the Association Agreement, not upon ratification.

Differently from association agreements leading to accession, the EU's Association Agreement with Ukraine does not foresee alignment of Ukrainian laws and regulations with all the *acquis*. Instead, it focuses on the core issues of specific services sectors that are important for trade and economic relations

44 See, for example, Article 7.34 EU-Korea Agreement, Article 115 EU-Chile Agreement of 2002, Article 147 EU-Andean Community Agreement of 2012.

between the Parties, in the first line.⁴⁵ This is a reasonable approach: due to the differences in the level of economic development of the partners and considering the fact that Ukraine is going to be eventually integrated into a much bigger European internal market, in anticipation of possible difficulties it is to Ukraine's benefit to adopt EU's standards, to modernise its legal system and economy, focusing on its strengths, to develop necessary infrastructure and to support the most future-oriented services sectors.

Following this approach, for the telecommunications sector⁴⁶, Annex XVII AA contains not only lists of legislative acts of the EU to be transposed into Ukrainian legislation, but names the exact Articles and/or specifies the exact issues to be borrowed from these acts. Thus, according to the Appendix XVII-3, Ukraine is to transpose in its national law selected provisions of five major Directives regulating the internal market for electronic communications services – Framework Directive, Authorisation Directive⁴⁷, Access Directive, Universal Service Directive and Competition Directive⁴⁸ – and the Decision on radio frequency policy in the EU⁴⁹. For example, from the Framework Directive the following issues need to be transposed:

- definition of the relevant product and service markets susceptible to ex ante regulation,
- analysis of the above mentioned markets with a view to determine whether significant market power exists on them,
- independence and administrative capacity of the national regulator,
- public consultation procedures for new regulatory measures, and
- mechanisms for appeal against decisions of the national regulator.

Do these and other specific provisions to be harmonised indeed constitute the necessary core? For the electronic communications sector this question can be

45 This is an approach adopted for all areas of the cooperation under the Association Agreement, not only for trade in services.

46 Interestingly, there is a terminological switch so that Annex XVII refers once again to telecommunications services.

47 Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108 of 24.04.2002, pp. 21-32.

48 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249 of 17.09.2002, pp. 21-26.

49 Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community, OJ L 108 of 24.04.2002, pp. 1-6.

answered in the affirmative. The listed specific provisions contain notions (significant market power, universal service, network facilities) and principles (independence of the regulator, transparency, non-discrimination) central for EU legal framework. These fundamentals of the EU legal and regulatory framework are likely to remain the same while details evolve. They effectuate the adoption of the EU's system and logic in regulation of electronic communications markets by Ukraine so that a leading role is assumed by strong competition law with corrective targeted intervention of a (strong) regulator to support or restore effective competition. Additionally, regulation and law should assume an enabling role and create conditions and incentives for competition by, for instance, strengthening users' rights, introducing number portability and ensuring efficient use of radio spectrum. These measures should allow for a development of domestic economy and competition and prepare Ukrainian electronic communications providers for the regulatory environment and fierce competition in the EU internal market so that Ukraine can actually sustain free trade with the EU. They also support Ukrainian efforts to fulfil its liberalisation commitments under the Association Agreement and the GATS and they serve to substantiate rules on domestic regulation.

The focus on the core issues allows for a certain degree of discretion and renders the Association Agreement more flexible. On the one hand, Ukraine is free to continue approximation of its laws beyond the minimum suggested by the Association Agreement (what presumably should be rewarded by the EU with enhanced market access). On the other hand, the Annexes can be amended or new Annexes can be negotiated with further harmonisation guidelines depending on the progress and taking into account the evolution of the EU *acquis*. This is in line with the principle of progressive liberalisation and the obligation to review the established legal framework regularly and to further address remaining obstacles through negotiations (Arts. 89 and 96 AA).

The positive implications are, however, overshadowed by the lack of legal certainty with regard to the achievement of a necessary level of harmonisation so that the question of finality of regulatory approximation remains open. According to Article 3 para. 3 Annex XVII AA, the Trade Committee⁵⁰ has the competence to extend the lists of regulatory acts in Appendices to Annex XVII that are to be transposed into Ukrainian legislation and to decide on an indicative period for their transposition. From the wording of the named provision it is not clear whether the Trade Committee may add only new EU acts that have been adopted since the text of the Association Agreement was initialled or whether it may add any act it considers necessary for further regulatory ap-

50 The Trade Committee is the Association Committee meeting in Trade configuration (see Article 464 AA in conjunction with Article 465 para. 4 and Article 29 para. 4 AA).

proximation. Also, there are no criteria or conditions for the addition of new EU acts. Under these circumstances, the limits of regulatory approximation become less clearly defined: does the Association Agreement intend full harmonisation or only partial approximation and how is this part defined? All this has serious implications for an assessment of proper approximation and for the opening of the EU internal market for Ukraine as will be discussed in Section 5 of this paper.

Before turning to problematic questions of procedural nature, it is of benefit to follow the transposition list of the Appendix XVII-3 to the end. Even though the title of this Appendix is “Rules applicable to telecommunications services”, one can find Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access⁵¹, the e-Commerce Directive⁵² and the Electronic Signatures Directive⁵³, all of which cover neither telecommunications services in the sense of the Ukrainian list of commitments nor electronic communications in the sense of the EU framework. On the contrary, they refer to broadcasting services and information society services that are explicitly excluded from the scope of electronic communications (Article 2 (c) Framework Directive). The implementation period for these Directives is much shorter: two to three years. At the same time, Article 140 AA on regulatory aspects of electronic commerce is cautiously phrased and speaks of maintaining a dialogue between the Parties on recognition of certificates of electronic signatures, protection of consumers in e-commerce and other issues of e-commerce. Clearly, the listed Directives are of central importance for the development of electronic trade and business, but they are not part of the electronic communications sector. Rather, they build foundations for a downstream market. Strictly speaking, approximation of these rules is necessary for opening up the market of electronic services.

51 OJ L 320 of 28.11.1998, pp. 54-57.

52 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, OJ L 178 of 17.07.2000, pp. 1-16.

53 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13 of 19.01.2000, pp. 12-20.

4. Ukrainian legal and regulatory framework for telecommunications sector

This section examines the legal and regulatory framework governing the telecommunications sector of Ukraine, namely provision of telecommunications services and network infrastructure, with the aim to identify to what extent Ukraine has already reformed its legal and regulatory framework and what specific work is still necessary in order to comply with Ukrainian's GATS commitments and the EU-Ukraine Association Agreement provisions.

The study starts with a brief overview of the main legislative acts regulating the telecommunications sector of Ukraine and explanations of some basic features of Ukrainian telecommunications Law. The current state of market liberalisation is analysed in terms of whether the market has been in fact liberalised and to what extent sector specific regulation is employed.

4.1 *Overview of the legal basis*

Key goals and strategies for the development of telecommunications networks of common use under market conditions and for attainment of strategic interests and competitiveness of Ukraine on the international market are defined in the Telecommunications Development Concept⁵⁴ adopted by the Cabinet of Ministers of Ukraine in 2006. Within this policy framework, main legislative acts regulating the provision of telecommunications networks and services in Ukraine are the Law of Ukraine "On Telecommunications"⁵⁵ (Telecommunications Law), the Law of Ukraine "On Radio Frequency Resource of Ukraine"⁵⁶ (Radio Frequency Law) and the Rules for Rendering and Obtaining of Telecommunications Services⁵⁷ (Telecommunications Services Rules).

The Telecommunications Law sets out general objectives, principles and notions for the telecommunications market regulation as well as an institutional framework for regulation, governmental administration and operation of the telecommunications industry and telecommunications networks of common use. More specifically, it contains interconnection rules, licensing requirements and procedure, terms and conditions for the public telecommunications ser-

54 Концепція розвитку телекомунікацій в Україні. Approved by the order of the Cabinet of Ministers of Ukraine, Kyiv, 7 June 2006, N 316-p.

55 Закон України "Про телекомунікації", Kyiv, 18 November 2003, N 1280-IV.

56 Закон України "Про радіочастотний ресурс України", Kyiv, 1 June, N 1770-III.

57 Постанова Кабінету Міністрів України "Про затвердження Правил надання та отримання телекомунікаційних послуг", Kyiv, 11 April, N 295.

vices provision, regulation of the numbering resource and tariff regulations.

The Telecommunications Law prescribes the following main principles for activities in the telecommunications field: to ensure an access to and availability of public (universal) telecommunications services of defined quality and range at an affordable price to all consumers in the entire territory of Ukraine, to guarantee interconnection and sustainability of the telecommunications networks and promote competition, to provide an efficient use and management of scarce resources, and to ensure efficiency and transparency of the telecommunications regulation (Article 6 of the Telecommunications Law).

Article 1 of the Telecommunications Law defines telecommunications as transmission, emission and/or reception of signs, signals, written text, images and sounds or messages of any kind by radio, wire, optical or other electromagnetic systems. Accordingly, a telecommunications service is a product of the activity of a telecommunications operator and/or provider aimed at satisfying consumer demands in the telecommunication area.

According to 38 of the Telecommunications Law, individuals and legal entities providing telecommunications services are divided into telecommunications service operators (telecom operators) and telecommunications service providers (telecom providers). The difference between the two is that telecom operators are allowed to use and maintain telecommunications networks, to obtain licences and numbering resource, to assign the numbering resource to end-users (secondary allocation) and to interconnect telecommunication networks, but telecom providers do not have these possibilities. In order to be able to provide telecommunications services, telecommunications service providers have to enter into an agreement with a telecom operator who is an Ukrainian resident, and they further act on the basis of a telecommunications license of this operator covering the particular type of activity. Additionally, telecom providers have to request to enter their details into the register of telecom operators and telecom providers (Register),⁵⁸ managed by the National Commission for the State Regulation of Communications and Informatisation (NCCIR).

Terms and conditions of telecommunications services provision are also regulated by various by-laws adopted by competent state authorities. For instance, the Telecommunications Services Rules aim at the protection of the rights of end-users of telecom services and govern the interaction between telecommunication operators and providers, on the one hand, and consumers of services, on the other. They also contain main license terms of rendering tele-

58 Порядок ведення реєстру операторів, провайдерів телекомунікацій. Approved by the Decision of the NCCIR, Kyiv, 1 November 2012, N 560.

communication services and set out general principles and procedures for telecommunication services provision.

The Radio Frequency Law establishes general rules for allocation and use of the radio frequency spectrum. It lays down competences of governmental bodies in regulating, controlling and monitoring the use of the radio frequency spectrum and establishes liability for its misuse.

4.2 *Regulatory authorities*

Pursuant to Article 13 of the Telecommunications Law, several governmental bodies are competent to regulate the telecommunications industry in Ukraine: the Cabinet of Ministers of Ukraine (CMU)⁵⁹, the National Commission for State Regulation of Communications and Informatisation of Ukraine (NCCIR)⁶⁰, the Ukrainian State Centre of Radio Frequencies (UCRF)⁶¹, the State Service of Special Communication and Information Protection in Ukraine (State Service)⁶², and others.

The Cabinet of Ministers of Ukraine – the supreme body of executive power of Ukraine – is responsible for realisation of the state policy and state regulation of telecommunications sector as a whole as well as operation and administration of the state-owned entities and facilities in the telecommunications domain (Article 14 of the Telecommunications Law). It directs and coordinates activities of other executive authorities in the telecommunications area, but also ensures protection of competition and equal market conditions for undertakings of all types of ownership.

The NCCIR acts as a principal regulator and develops the whole range of implementing instructions and regulations (Article 17 of the Telecommunications Law). The NCCIR consists of the Chairman of the Commission and six Commission Members, who are appointed to and dismissed from their positions by the President of Ukraine. The NCCIR is structurally separate from the government, it is subordinated directly to the President of Ukraine and ac-

59 Закон України “Про Кабінет Міністрів України”, Київ, 27 February 2014, N794 – VII.

60 Указ Президента України “Про Національну комісію, що здійснює державне регулювання у сфері зв’язку та інформатизації”. Київ, 23 November 2011, N 1067/2011.

61 Стаття 16 Закону України “Про радіочастотний ресурс України”, Київ, 1 June 2000, N1770-III.

62 Закон України “Про Державну службу спеціального зв’язку та захисту інформації України”, Київ, 23 February 2006, N3475-IV.

countable to the Parliament of Ukraine – Verkhovna Rada. It is also legally distinct and functionally independent from any telecoms provider. However, the NCCIR cannot be considered a completely independent body because its independence is not formally established in the Telecommunications Law and because its members are appointed and dismissed by the President of Ukraine meaning that this can happen in an arbitrary manner.

The NCCIR possesses extensive competences that allow it to fully regulate, monitor and supervise activities in the telecommunications market. It allocates the radio frequency spectrum and numbering resource, to ensure their effective use; establishes licensing and registration procedures; sets tariffs for public telecommunication services, including special tariffs for socially disadvantaged people, and controls quality of service; regulates interconnection and so on (Article 18 of the Telecommunications Law). The NCCIR can impose penalties on telecom operators and providers for violations of legal and regulatory provisions. Any decision by the NCCIR can be appealed to a court by an individual or a legal entity.

Its legal status does not allow the NCCIR to initiate legislative proposals or to submit draft laws, related to the regulation of the telecommunications sector, directly to the Parliament of Ukraine. However, in accordance with Article 18 of the Telecommunications Law and paragraphs 4.4 and 4.5 of the Regulation of the NCCIR, the NCCIR can make suggestions for legislative proposals and standards in the spheres of its competences to the President and the Cabinet of the Ministers of Ukraine.

In accordance with "The procedure of market analysis of transmission services and identifying operators with significant market power"⁶³, the NCCIR conducts an analysis of the telecommunications market and prepares suggestions for legal acts and state regulation to ensure market balance, improvement of conditions for competition. The market analysis results in a NCCIR decision that identifies separate markets of telecommunications services and determines operators and/or providers with significant market power. This can further lead to imposition of specific obligations upon such operators and providers, for instance, application of special tariffs set by the NCCIR or obligation of interconnection with a telecommunications network of another operator at the points specified in the catalogue offers of telecommunications operators (Articles 18 and 59 of the Telecommunications Law).

However, the NCCIR cannot impose any obligations on undertakings in or-

63 Рішення Національної комісії з питань регулювання зв'язку України "Порядок аналізу ринків послуг пропуску трафіка та визначення операторів телекомунікацій з істотною ринковою перевагою" Київ, 25 August 2011, N444.

der to control their anti-competitive behaviour under competition law. This competence is reserved for the national competition authority – the Antimonopoly Committee of Ukraine⁶⁴. The NCCIR can only impose penalties when a telecommunications undertaking violates conditions of its license or does not comply with price regulation. To this end, the NCCIR lacks competences to regulate all aspects of the telecommunications market and to respond to non-competitive practices. In the cases of breach of competition law and when there are reasoned suspicion or signs of abuse of dominant position on the telecoms market, the NCCIR relies on the powers of the Antimonopoly Committee. In such situations it has to hand over all materials of its analysis with the request to examine whether there is effective competition on the market (Article 18 of the Telecommunications Law).

The NCCIR exercises its activities in compliance with the principle of openness (Article 22 of the Telecommunications Law). Comprehensive information about the NCCIR, its activities and adopted documents is publicly available by the way of official publication and via the NCCIR's website (also in English)⁶⁵. The NCCIR establishes conditions to organise public participation at its meetings and consultations for decision-making processes. One of the common practices in this regard is the organisation of round tables to enhance an interaction between the NCCIR and the public.⁶⁶

Under Article 11 of the Radio Frequency Law, the Ukrainian State Centre of Radio Frequencies is the central executive body to carry out administration and control over the radio spectrum resource of Ukraine. The UCRF is to ensure the effective use of the radio frequencies in Ukraine and for this it is entrusted with allocation and use of the radio frequency spectrum. In its activity the UCRF is subordinated to and supervised by the NCCIR (Article 14 of the Radio Frequency Law).

The State Service is one more central executive body in the telecommunications sector that is largely responsible for standard-setting, establishment of precise requirements for networks, services and equipment, and for their con-

64 Закон України “Про Антимонопольний комітет України”, Kyiv, 26 November 1993, N3659 – XII.

65 See <<http://nkrzi.gov.ua>>.

66 To illustrate this activity, one of the recent examples was a round-table on the topic: "Problems of Communications and Informatisation" the NCCIR held on June 26, 2014. Participants discussed recommendations and provided proposals to develop and refine a number of legal acts, including the draft on the basic principles of state regulation, changes to the Concept of development of telecommunications in Ukraine, and the draft of Law of Ukraine "On the Fundamentals of information and communication infrastructure".

trol and certification. Besides, it develops and implements state technical policy in the field of cryptographic and technical information security, telecommunications, and radio frequency resource of Ukraine (Article 14 of the Law of Ukraine "On the State Service for Special Communications and Information Protection of Ukraine").

4.3 Providing telecommunications services in Ukraine

Article 6 of the Telecommunications Law reserves the exclusive right to provide telecommunications services for Ukrainian entities. Legal entities shall be located in the Ukrainian territory and incorporated in accordance with Ukrainian laws, and natural persons who are business entities shall have permanent residence in the territory of Ukraine. At the same time, Ukraine is open to foreign equity ownership and has no restrictions on foreign direct or indirect ownership of companies or investment in the telecoms sector.

4.3.1 Licensing

Licensing is a key tool of telecommunications regulation to control market entry and, therefore, can be used to shape the market by limiting the number of players and/or types of services provided. Licensing can also be used to create or enhance competition in the market by imposing certain obligations on incumbents with a view to equalize the market conditions for various players and ensure the provision of socially desirable services or outcomes, such as access for disabled users or universal service.

In the legal framework of Ukraine general authorisation regime in form of notification had been applicable until the Market Access Law was adopted in 2011⁶⁷. The latter introduced a regime of individual authorisation. By contrast to the old procedure that required only a prior notification with the NCCIR, registration in the NCCIR Register of operators and providers of telecommunications and could be accomplished within a week, the Market Access Law foresees different procedures. An undertaking may operate on the telecommunications market of Ukraine upon the simple entering into the Register, if the intended activities can be carried out without a license. In such a case, an undertaking must comply with the Telecommunications Services Rules. Thus business entities, intending to engage in licensed activities, must submit an application for entry into the Register and an application for license to the

67 Закон України “Про внесення змін до деяких законів України щодо спрощення умов доступу на ринок телекомунікаційних послуг”. Київ, 5 July 2011, N 3566-VI.

NCCIR accompanied by a number of documents. This makes it overall more complicated to operate within the Ukrainian market as a telecommunications operator than a telecommunications provider.

An exhaustive list of telecommunications services subject to licensing is contained in Article 42 of the Telecommunication Law. Basically, only the activities of operators, not providers are listed there:

- local, inter-city and international fixed-line telephone services, with the right to maintain and operate telecommunications networks and lease communications channels;
- local, inter-city and international fixed-line telephone services using wireless access to telecommunications networks, with the right to maintain and operate telecommunications networks and lease communications channels;
- mobile services, with the right to maintain and operate telecommunications networks and lease communications channels;
- maintenance and operation of a telecommunications network, on-air and cable broadcasting and television networks.

Due to specific characteristics of telecommunications services subject to licensing, there are five different types of license conditions⁶⁸, addressing each

68 Ліцензійні умови здійснення діяльності у сфері телекомунікацій з надання послуг фіксованого телефонного зв'язку з правом технічного обслуговування та експлуатації телекомунікаційних мереж і надання в користування каналів електрозв'язку: місцевого, міжміського, міжнародного. Approved by the Decision of the NCCIR. Kyiv, 10 December 2009, N 1789; Ліцензійні умови здійснення діяльності у сфері телекомунікацій з надання послуг фіксованого телефонного зв'язку з використанням безпроводового доступу до телекомунікаційної мережі з правом технічного обслуговування і надання в користування каналів електрозв'язку: місцевого, міжміського, міжнародного. Approved by the Decision of the NCCIR. Kyiv, 29 July 2010, N348; Ліцензійні умови здійснення діяльності у сфері телекомунікацій з надання послуг рухомого (мобільного) телефонного зв'язку з правом технічного обслуговування та експлуатації телекомунікаційних мереж і надання в користування каналів електрозв'язку. Approved by the Decision of the NCCIR. Kyiv, 26 January 2006, N176; Ліцензійні умови здійснення діяльності у сфері телекомунікацій з надання послуг з надання в користування каналів електрозв'язку. Approved by the Decision of the NCCIR. Kyiv, 07 December 2007, N1017; Ліцензійні умови здійснення діяльності у сфері телекомунікацій з надання послуг з технічного обслуговування і експлуатації телекомунікаційних мереж, мереж ефірного теле- та радіомовлення, проводового радіомовлення та телемереж. Approved by the Decision of the NCCIR. Kyiv, 11 November 2010, N513.

of them. The requirements, set out by the license conditions can be broadly categorised as organizational, qualifying, technological and “other” conditions. Organizational, qualification and technological conditions are uniform and applicable to all telecommunications services. The “other” conditions are individual obligations and vary broadly depending on the type of service to be provided. They are included additionally in the licence where necessary and refer to the use of network infrastructure, mandatory interconnection requirements, provision of specific technical infrastructure and conditions for specific monitoring, etc.

Under Art 46 of the Telecommunications Law, the NCCIR shall take a decision on issuing a license within 30 working days since the registration of an application for a license. If the licensed activity requires the use of limited resources (radio frequency or/and numbering resource) this period can be extended up to 60 working days. In case of a refusal, substantive grounds shall be provided.

Due to the limited availability of radio spectrum, the need to protect revenue flows of a recently privatized incumbent, and in order to ensure its ability to penetrate geographically more broadly with the lower infrastructure cost by installing new or upgrading aged fixed lines infrastructure, the regulator may restrict the number of licenses. According to Article 47 of the Telecommunications Law, the NCCIR may take a decision on restricting the quantity of licenses for certain kinds of business activity in the area of telecommunications services provision in order to ensure the efficient use of telecom networks and scarce resources in the interest of consumers. Although in these circumstances licensing is used to control market entry, the Article provisions are constructed to introduce competition. Thereby, if a decision on restricting the quantity of licenses is made, the licenses shall be granted on a competitive basis in an open, non-discriminatory and transparent procedure and under equal conditions and requirements for all participants, which means individual requirements cannot be included to the license terms.

In case of taking a decision on restricting the number of licenses, licensing requirements and specific procedure are determined by the NCCIR in accordance with Article 47 of the Telecommunications Law. The NCCIR is obliged to announce a tender 60 days in advance by a publication in the NCCIR official bulletin.

In accordance with Article 48 of the Telecommunications Law, the validity term of telecommunications licenses is determined by the NCCIR individually, but may not be less than 5 years. The license term may be extended upon the licensee’s application (Article 49 of the Telecommunications Law). A license contains information on a specific area of telecommunications services provi-

sion. Information about the issuance of the license and special conditions set out in the license shall be published in the NCCIR official bulletin.

The Cabinet of Ministers of Ukraine determines a fee for the issuance of licenses, reissuance thereof, issuance of duplicates, copies and extension of the period of validity. The amount of a fee varies strongly depending on a telecommunication service from UAH 340 for provision of fixed-line telephone services in rural areas to UAH 8 933 000 for provision of international fixed-line telephone services (Article 53 of the Telecommunications Law). As a result, even when the number of licenses to provide services in a particular market is not formally limited, it is apparent that high license fees can effectively limit the number of entrants to a lucrative market that is being reserved for the incumbent.

4.3.2 Scarce telecommunications resources

Both radio frequency and numbering resource are recognised by the Telecommunications Law as scarce resources (Article 70 of the Telecommunications Law). In order to ensure that they are utilized efficiently and managed in the best interests of society the Telecommunications Law establishes principles of their allocation: openness, non-discrimination, impartiality, competitiveness and equality of rights of access to the scarce resources for all telecommunications operators, usage of the numbering resource on a permissive and paid basis ensuring the rational use of the numbering resource (Article 69 of the Telecommunications Law in conjunction with Article 30 of the Radio Frequency Law).

Radio frequency spectrum allocation is carried out according to the Plan for the Use of Radio Frequency Resource in Ukraine (Radio Frequency Plan)⁶⁹ (Article 23 of the Radio Frequency Law). The Radio Frequency Plan is designed to ensure a forward-looking implementation of radio technologies and efficient use of radio frequency resource in Ukraine. It provides an exhaustive list of permitted radio technologies with the definition of radio frequencies and radio communication services, and termination terms of use.

The radio frequency spectrum may be allocated on a competitive basis through tender or auction procedure or on a non-competitive basis. In case the demand for the radio spectrum exceeds its availability, the license is granted on a competitive basis according to procedures and conditions established by the NCCIR. The announcement of a tender and the results of such tender shall

69 План використання радіочастотного ресурсу України. Approved by the Decree of the Ministry of Transportation and Communication of Ukraine. Kyiv, 23 November 2006, N 1105.

be published in the NCCIR official bulletin. The tender procedure shall comply with the following conditions (Article 30 of the Radio Frequency Law):

- 1) The tender notification shall be announced no later than 60 calendar days prior to the intended day of the tender by a publication in the Official Journal of the NCCIR and on its web site.
- 2) Business entities are obliged to notify the NCCR about their intention to join the tender and submit the required documents no later than 30 calendar days prior to the tender.
- 3) The NCCIR decision on the tender award shall be published within five business days of the date of tendering in the Official Journal of the NCCIR and on its web site.

Pursuant to the Radio Frequency Law (Articles 29, 31), the following activities are subject to individual authorization, and the legislation provides no exemptions under which such requirement can be waived:

- use of radio frequencies for telecommunication activities (license for use of radio frequencies) and
- use of radio, electronic and /or transmitting devices.

The license is granted by the NCCIR to the telecom operator that provides telecommunications services for the period established by the NCCIR, but not less than for five years. The license on radio frequency use shall contain information on allocated channels of radio frequencies, service, terms of its reclamation (development), a geographic area where radio spectrum will be used, configuration and conditions for that use that could include payment of a fee, power limitations and requirements for compliance with specific requirements for such things as electromagnetic compatibility and non-interfering operation at relevant radio spectrum (Article 31 of the Radio Frequency Law). Fees for the issuance of a license for the use of radio frequency resource of Ukraine for a period of five years depend on the geographical location of the area where services shall be provided, the frequency range and vary from a minimum fee of UAH 170 to a maximum fee of UAH 1 360 000 (in Kiev) per 1 MHz.⁷⁰

The license is granted to a particular legal entity and cannot be transferred. However, the radio frequency used by telecom operators under the respective license may be relocated upon the joint application of telecom operators to increase the efficiency of the use. Yet, the license is not transferred in such a case and will be received in the usual procedure.

70 Постанова Кабінету Міністрів України “Про розміри плати за видачу, продовження строку дії, переоформлення, видачу дублікатів ліцензій на користування радіочастотним ресурсом України”. Kyev, 22 February 2006, N 200.

If the licensing activity requires the use of the numbering resource, a telecom operator must obtain the permit for allocation of the numbering resource from the NCCIR (Article 70 of the Telecommunications Law). For allocation of the numbering resource, the telecom operator shall file a respective application to the NCCIR with necessary supporting documents (letter of substantiation, business plan, etc.). Such application is considered by the NCCIR within one month, and a permit is issued within three days upon payment of the allocation fee. The permit specifies the validity period of the respective telecommunications license without the right to assign it to third parties, except for secondary allocation to end-users. If the numbering resource is generated for the purpose of providing services, which are not subject to licensing, the permit is granted for 5 years. The numbering resource shall be put into operation within a period of time specified in the permit in order to ensure its efficient use; otherwise the permit can be withdrawn by the NCCIR.

Moreover, the permit and the allocated numbering resource can be withdrawn on the basis of the NCCIR decision in the case of a misuse of the numbering resource or its illegal transfer to third parties, in case of an annulment or expiry of the license that was a ground for allocation of the numbering resource, and if the telecom operator applies for this (Article 70 of the Telecommunications Law).

Provisions on state regulation of numbering resource of the telecommunications network use of Ukraine, the availability of numbering resources, efficiency of the use of previously allocated numbering resources by the applicant, the amount of work already performed, specific perspectives for development of the applicant's infrastructure are taken into consideration by the NCCIR while making a Decision on allocation or refusal to allocate the numbering resource of Ukraine. In case an absence of available numbering resources on a specific territory, the NCCIR establishes a reserve capacity of numbers and, empowered by its separate decision, suspends the examination of applications on an allocation of numbering resource in the area.

4.3.3 Interconnection

The regulatory authority is obliged to ensure smooth interconnection between operators, including national roaming and possibility of migration of phone numbers between operators, their cooperation for interconnection purposes, based on an individual agreement between two market players. It also resolves disputes with regard to the interconnection between telecommunications networks.

According to the Article 1 of the Telecommunications Law, interconnection is a type of access right involving physical means of connecting two different

networks for exchange of traffic, enabling users of one network to communicate with users of the other. The legal framework for interconnection contains regulated rights of operators to access each others' networks and services at a wholesale level, but not the rights of end users to access telecommunications services at a retail level.

Article 57 of the Telecommunications Law lays down principles of interconnection between networks and contains relevant requirements to operators. Technical, organizational, commercial conditions and tariffs of interconnection to the operators that hold the monopolistic (dominant) position in the telecommunications market shall be regulated by the NCCIR. Telecommunications operators are obliged to comply with technical requirements and the traffic routing procedure stipulated for telecommunications networks. The decision of the NCCIR on the issues that arise between operators when entering into a contract on interconnection is binding and can be revoked only upon a court decision.

Article 60 of the Telecommunications Law and the Rules on interconnection of telecommunications networks contain main requirements of mainly procedural nature to agreements on network-to-network interconnection.⁷¹ All telecom operators and telecom providers shall notify the NCCIR when they enter into interconnection agreements, amend or terminate them. However, there is no obligation to disclose executed contracts (Article 60 of the Telecommunications Law).

In accordance with Article 58 of the Telecommunications Law, telecom operators have to ensure compliance with technical requirements stipulated for telecommunications networks, to provide other telecommunications operators willing to enter into interconnection contracts with all information necessary for this, as well as to offer interconnection conditions equal to those offered to other telecommunication operators. Telecom operators shall avoid creating obstacles for interconnection between telecommunications networks; they shall take measures to ensure stable and quality interconnection between telecommunications networks during 24 hours, inform each other about damage to a telecommunications network or other events that lead or may lead to deterioration of service. They shall also share accounting data of telecommunications services provided via interconnection points of their networks, make settlement of payments under the provisions of the contract in full amount and in a timely manner, comply with the traffic routing procedure stipulated by regulatory acts. Interconnection between telecommunications networks has to be provided at all technically feasible locations with the capacity required for

71 Правила взаємоз'єднання телекомунікаційних мереж загального користування. Approved by the Decision of the NCCIR. Kyiv, 8 December 2005, N 155.

quality provision of telecommunications services. When providing interconnection, operators are prohibited to require from each other performance of any kinds of works, services, incur costs aimed at installing additional equipment for their telecommunications networks.

The Telecommunications Law foresees special obligations for the telecom operators with significant market power. Such operator has no right to reject requests for interconnection with its telecommunications network unless a network to be interconnected with does not meet the requirements set out in the Telecommunications Law (Article 60 of the Telecommunications Law). Pursuant to Article 59 of the Telecommunications Law, telecom operators holding a monopolistic (dominant) position are required to submit to the NCCIR offers of interconnection. Any such offer shall contain information about the telecommunication network, all available access points, technical, organizational and other terms of interconnection. Telecom operators not holding a dominant position may disclose such offers at their own discretion. The NCCIR publishes such offers of interconnection in its annual Catalogue of Proposals on Interconnection of Telecommunications Networks. The NCCIR publishes information on interconnection agreements concluded by telecom operators on a quarterly basis (Art 59 of the Telecommunications Law).

4.3.4 Protection of public interest and consumer rights

Article 62 of the Telecommunications Law introduces the notion of publicly available telecommunications services that means a minimum set of services of standardised quality defined by this Law that is accessible to all consumers in the entire territory of Ukraine. Ukraine aims for ubiquitous coverage of its territory with publicly available services as the Concept of Telecommunications Development of Ukraine suggests.⁷² The Concept foresees a procedure and terms of providing access to publicly available services for consumers in rural, mountainous areas, as well as vulnerable consumer groups such as families with low income, pensioners and disabled people and foresees deadlines for providing the possibility of general access to publicly available services to the whole population of Ukraine, construction volumes of telecommunications networks and necessary capital investments for achieving this objective.

The publicly available telecommunications services include a connection to telecommunications networks of public use at a fixed location (also called universal access), the possibility to call emergency services and enquiry services

72 Концепція розвитку телекомунікацій в Україні. Approved by the Decree of the Cabinet of the Ministers of Ukraine, 7 June 2006, N 316-p.

and to use a pay phone. Article 63 of the Telecommunication Law further renders the criteria of the universal access provision more precise. It shall be provided at a consumer request to connect his or her terminal equipment to public telecommunications networks at regulated tariffs. The respective public telecommunications networks shall be able to provide voice-based telephony (both making and receiving of local, national, international calls), facsimile communications, data transfer on the level sufficient for consumers to access Internet. Additionally, the cost of the described connection shall not depend on access technology and the way of connecting.

Telecommunications operators and providers are obliged to employ special tariffs for publicly available telecommunications services to disabled and socially vulnerable persons – to be financed from a compensation mechanism to be set up by the Cabinet of Ministers of Ukraine. Emergency services (calling the fire brigade, police, ambulance, gas emergency service) shall be provided free of charge (Article 39 of the Telecommunications Law).

According to universal access provisions, when consumer demand for publicly available telecommunications services is insufficiently satisfied in certain regions of Ukraine, the NCCIR can take a decision to impose an obligation to develop and provide publicly available telecommunications services to consumers on the telecommunications operators with dominant position in that market rendering services on the entire territory of Ukraine as well as fixed-line communication operators exercising or intending to exercise business activity in provision of services in these regions. For the loss occurred while fulfilling these obligations, compensation may be requested through the mentioned compensation mechanism.

5. Perspectives of regulatory approximation and the stake in the EU internal market

The examination of the Ukrainian legislation and regulation governing telecommunications sector against the backdrop of its international obligations demonstrates that Ukraine has utilized the accession guideline and the negotiation procedure to the WTO in order to substantially revise its legal basis, to liberalise an access to its domestic services market and to lower regulatory barriers. At the moment, the majority of Ukrainian's commitments under the GATS are on the way to be realised as the legal foundation for it is in place.

A full-fledged legal and institutional reform⁷³ has been taking place since

73 For instance, since the ratification of the Ukraine's WTO Accession Protocol in 2008, important amendments to the telecommunications legal framework were in-

Ukraine joined the WTO, and it has been intensified by the signing of the Association Agreement with the EU and the change of the political course of Ukraine. One of the recent significant developments in this regard was the introduction of competition on the market for fixed telephony and the privatization of Ukrtelecom⁷⁴, the largest state-owned operator of fixed lines and 3G mobile network. Unfortunately, the Ukrainian telecommunications market is still far from being effectively competitive and requires intensive intervention by the regulator. This can be explained by the fact that Ukrtelecom as an incumbent enjoys a substantial market power in the telecommunications segment mostly due to the possession of the largest wired (copper) telephone network rolled out in the Soviet times. Competition between Ukrtelecom and local fixed-line telecom operators is very weak. On the other hand, competition law needs to be reformed, and its enforcement requires adjustment to the new economic reality.

A pivotal role in the transition from monopoly to competition obliges a strong pro-competitive regulatory authority. The NCCIR does possess the necessary competences to effectively regulate the telecommunications market, and it is being very active and rather transparent since its creation in November 2011. However, the efficiency and effectiveness of its activities cannot be adequately assessed due to the political turmoil of the recent years and the resulting from it changes in personnel and legal and regulatory framework. The tender to award licenses for 3G communication in an IMT-2000 (UMTS) standard is likely to be the first serious test for the NCCIR⁷⁵ as it might result in breaking the quasi-monopoly of Ukrtelecom owns through its subsidiary LLC “TriMob”⁷⁶ the only 3G license issued so far. This licence was obtained in 2005 on a non-competitive basis.

Although Ukraine has arguably started a comprehensive reform to modernise its legislation and transform its telecommunications market, the complex requirements under the Association Agreement, especially those with regard to regulatory approximation, are not likely to be reached in the near future. To start with, the independence and competences of the regulator NCCIR need to be further enhanced, especially in the sphere of regulation of operators and providers with significant market power. The list of possible remedies in the

roduced by 39 laws adapted by the Parliament of Ukraine.

74 In 2011 the Austrian investment firm EPIC bought 92.79 percent of the State stock for 10.5 billion hryvnas, which was an equivalent of around 972 million Euro at that time.

75 The tender is announced for the 16th of February 2015 as a voice trading. See <<http://www.nkrzi.gov.ua/index.php?r=site/index&pg=99&id=718&language=uk>>.

76 The company and license details are available on its official website: <<http://3mob.ua/about>>.

context of market regulation needs to be updated and the measures themselves to become more nuanced. Principles of competition shall be deeper integrated in the sector specific regulation, for instance, in the part of price regulation; this requires, of course, the enhancement of the role of competition law and its modernisation.

Implementation of precisely defined EU law provisions will take a lot of time and conceptual adjustment. The level of development of Ukrainian infrastructure lags behind EU Member States so that not all regulatory solutions required by the EU can be implemented in Ukraine and some intermediary steps will be necessary. The above-mentioned tender for 3G licence is a perfect demonstration of this thesis: it occurs when in the EU most countries are auctioning off 4G/LTE licences, and the universal coverage with basic broadband of 1 mbps was reached in September 2013.⁷⁷ In addition, the current political situation complicates the proper legislative developments and their further implementation.

At the same time, the Association Agreement foresees a tough implementation deadline: for all of the above-mentioned items in the telecommunications area it is four years upon the entering into force of the Association Agreement, except for the Competition Directive which is to be implemented within two years. This may seem short. However, the process of regulatory approximation is to start on the date of signing of the Association Agreement. Between signing and entering into force many years will pass giving Ukraine a great amount of time to lay foundations for this undertaking, namely to familiarise itself with the full substantive content of the requirements, to determine the scope of necessary legal, institutional and administrative reforms, to conduct an impact assessment, to assess the required budgetary needs, to start institutional reforms and amendments of related legal and regulatory frameworks and so on.

However, the procedural provisions concerning regulatory approximation and the possibility for Ukraine to take part in the internal market reveal some shortcomings such that it might be difficult to assess progress of Ukrainian reforms and to define the moment when closer market integration could happen.

Approximation and implementation of laws are controlled under separate procedures (Appendix XVII-6, Sections 3 and 4 respectively). First, the appropriateness of implementation is evaluated (approximation) with the help of special cross-comparison tables (transposition tables). Then, continuity of application and adequacy of enforcement of the national laws is assessed that have been classified as properly implemented by a competent European Com-

77 See the press release by the European Commission <http://europa.eu/rapid/press-release_IP-13-968_en.htm>.

mission service. This is done on the basis of “adequate evidence” that includes sufficient administrative capacity, satisfactory track record of sector-specific surveillance and investigation, prosecutions and administrative and judicial treatment of violations.

The stake in the EU internal market will be granted sector by sector, following Ukraine’s progress in approximation of sectoral regulation. When Ukraine considers that regulatory approximation in a given sector has been achieved, it informs the EU, and the EU in cooperation with Ukraine undertakes a comprehensive assessment of the approximation and enforcement of sectoral rules (Article 4 para. 2 Annex XVII AA). The EU then reports to the Trade Committee whether all conditions are indeed satisfactorily fulfilled. If the report is positive, the Trade Committee may decide that the Parties shall grant each other internal market treatment with respect to the sector at issue (Article 4 para. 3 Annex XVII AA).

What exactly is internal market treatment and how does it differ from national treatment? According to Article 88 AA, national treatment means treatment no less favourable than accorded to own legal persons, branches and representations. Internal market treatment means that there are no restrictions on freedom of establishment and services provision for legal persons of the other Party and that they shall be treated in the same way as own legal persons (Article 4 para. 3 Annex XVII AA). The Association Agreement suggests that there is a difference between treating “no less favourably”⁷⁸ and treating “in the same way”, although it is not entirely clear. The latter treatment is a more advanced form of commitment, even though the wording implies that internal market treatment could be less advantageous than national treatment.

A definite part of the internal market treatment is granting freedom of establishment and freedom of services provision, although it can be argued that they are already part of national treatment,⁷⁹ what makes the distinction between the two more obscure. According to the Association Agreement, the indicated freedoms apply only to legal persons, and it is not completely clear what implications it will have for posted workers. Free movement of workers and self-employed is clearly excluded and can further remain subject to domestic restrictions (Article 4 para. 6 Annex XVII AA). Obviously, in these areas additional negotiations and separate agreements are necessary. Moreover,

78 On the meaning of „no less favourable“ under the GATS see the WTO Panel Report and Appellate Body Report on the case EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R and WT/DS27/AB/R, respectively, of 09.09.1997.

79 Mattoo, Aaditya, National Treatment in the GATS: Corner-Stone or Pandora’s Box?, in: Journal of World Trade 31:1, 1997, esp. at pp. 114-117.

while speaking in terms of fundamental economic freedoms makes perfect sense when characterising the market opening in the EU, it is less sensible for Ukraine for which national treatment is the limit. By comparison to the EU that has a possibility to grant a Ukrainian subsidiary, established in one of its Member States, secondary freedom of establishment for the whole Union,⁸⁰ Ukraine cannot do this. Therefore, a logical way to interpret Article 4 para. 3 Annex XVII AA is that freedom of establishment and freedom of services provision starts to apply in full between the EU and Ukraine, but only in relation to legal persons and only to the sector where regulatory approximation is accomplished. It needs to be seen, however, whether this value-added to national treatment is a sufficient incentive for Ukraine to undertake a radical reform.

Granting the internal market treatment on the sector-by-sector basis is an unorthodox approach. During the accession process, the EU opened up its market on the territorial basis (country by country, in some cases) and/or on the basis of individual fundamental freedoms. Opening market access sector by sector corresponds to the logic of the GATS negotiations and commitments and highlights the balancing act that the Association Agreement is trying to manage, namely to incorporate the sector-based approach to trade liberalisation at the international level and the EU approach based on fundamental freedoms.

The benefits of the market opening on the sector-by-sector basis are not immediately clear. To begin with, due to the above-discussed possibility of extension of the transposition lists by the Trade Committee (see Article 3 para. 3 Annex XVII AA) it may not be easy for Ukraine to establish the point in time when conditions for completing the enactment and implementation of the (parts of) *acquis* are fulfilled to its satisfaction. The possibility to constantly add new transposition tasks will have the effect of keeping Ukraine running after a carrot with very low chances of getting it. Also, it makes a joint assessment of this completion by the EU and Ukraine a complicated task providing an additional reason to disagree and to postpone the granting of the internal market treatment.

Furthermore, regulatory approximation in the services sectors, which are the scope of application of Annex XVII AA, and approximation of laws provided for in other provisions of a horizontal character (for instance, in the field of competition, Article 256 AA, and public procurement, Article 148 AA) are not clearly interlinked. The same is the case for other obligations (for example, on intellectual property rights, on state aid) that has a clear objective to align

80 Currently, the EU's schedule of specific commitments to the GATS explicitly exempts application of fundamental freedoms of establishment and services provision to subsidiaries from third-countries where national treatment has been granted by individual Member States.

Ukrainian practice to the EU standards and rules and can be considered laws approximation in disguise. The question arises whether a sector can be granted the internal market treatment before approximation of these general issues is completed. The Association Agreement does not provide for an assessment mechanism of this type of legal and regulatory approximation and there are no rules on how it is taken into account for individual sectors evaluation. All in all, it remains unclear whether full harmonisation is necessary for Ukraine's participation in the internal market.

Additionally, sector-by-sector approach leaves the question open at what moment the EU market in services is completely open or whether it will ever happen. Differently from Section 1 Chapter 6 "Establishment, Trade in Services and Electronic Commerce", which apply to all services (Article 86 para. 13, Article 87, Article 92 AA), Annex XVII AA applies only to four services sectors: financial services, telecommunications services, postal and courier services and international maritime transport services. Besides, as described above, the internal market treatment will apply only to two fundamental freedoms and not in full: freedom of establishment and freedom of services provision – both for legal persons. Is there a possibility to expand the internal market treatment beyond this, namely to natural persons and/or to other services sectors?

To end on the positive note, sector-by-sector market opening has its advantages. First, it allows Ukraine to set priorities and to exploit its comparative advantages while fulfilling its obligations of approximation. For instance, Ukraine may start with sectors that require less legislative efforts, that are already sufficiently open due to reforms in connection with its accession to the WTO and that are economically more competitive and/or more important. Second, by working intensely on individual sectors to obtain internal market treatment, Ukraine will steer investments. Once again, this is a call for strategic economic planning for Ukrainian policy-makers. Third, the piecemeal tactics suits well the EU's purposes. Because the accession offer is not on the table, it would have been a difficult task to keep Ukraine waiting until all preconditions are fulfilled in order to grant fundamental freedom in all services sectors. This may take years or even decades and obstruct Ukrainian reforms. By contrast, opening the internal market to individual sectors whose regulation has been successfully harmonised and enforced sends an immediate positive signal. It may also stimulate interested actors (lobbyists, consumers) in different sectors of economy who, in their turn, would exercise pressure on the government to actuate reforms. It may also lead to a competition between individual governmental authorities to complete the reforms in their respective sectors.

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